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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SONNY JAMES MORALES, Defendant and Appellant.	F073064 (Super. Ct. No. F14907189) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant was convicted following a jury trial on one count of child abuse (Pen. Code, § 273a, subd. (a))[1], and one count of corporal injury to a child (§ 273d, subd. (a)), both involving infliction of great bodily injury upon a child under the age of five (§ 12022.7, subd. (d)). Appellant admitted that he suffered a prior strike and prior serious felony conviction for robbery (§§ 211, 667, subds. (a)(1), (b)–(i), 1170.12, subds. (a)–(d)), and two prior prison terms for drug possession and felon in possession of ammunition (§ 667.5, subd. (b)). The trial court sentenced appellant on count one to the upper term of six years, doubled pursuant to the "Three Strikes" law, plus four years for the great bodily injury enhancement, and five years for the prior serious felony. The sentence on count 2 was stayed pursuant to section 654 and, in the interests of justice, the court struck the two prior prison term enhancements. Appellant was sentenced to an aggregate term of 21 years in state prison.

On appeal, appellant argued the evidence was insufficient to support his convictions. He also argued a prior uncharged act of domestic violence was improperly admitted in this child abuse prosecution and, relatedly, the jury was improperly instructed with CALCRIM No. 852. On October 18, 2018, in an unpublished opinion (*People v. Morales* (Oct. 18, 2018, F073064)), we rejected appellant's contentions and affirmed the judgment.

Thereafter, appellant filed a petition for rehearing, seeking remand for the trial court to exercise its newly afforded discretion to strike appellant's prior serious felony enhancement pursuant to recent amendments to section 667, subdivision (a) and section 1385, subdivision (b). On November 1, 2018, we vacated our opinion and granted rehearing. We now conclude that appellant is entitled to remand for the court to consider striking his prior serious felony enhancement. We otherwise affirm the judgment.

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1 All further statutory references are to the Penal Code unless otherwise noted.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant married Irene S.[2] on July 13, 2014. Irene had two small children, M. and F. They all lived with appellant in an apartment. In the early hours of July 29, 2014, F.'s feet and ankles were severely burned by scalding water. As discussed below, the mechanism of F.'s injuries was disputed.

A. F.'s Injuries

At about 2:50 a.m. on July 29, 2014, F. was examined by Dr. Lawrence Satkowiak, medical director for the emergency room at Valley Children's Hospital. Dr. Satkowiak was qualified at trial as an expert in emergency pediatric medicine.

Irene reported to Dr. Satkowiak that she and appellant awoke in the night to find F. standing in a sink of hot water. Dr. Satkowiak found that F.'s feet were burned in a "stocking glove pattern," meaning that the feet were completely burned from the ankles downward. The burn lines were well defined and sharply demarcated on both ankles at the same level. There were no splash marks on either leg. There was no area on the feet that was spared from the burns. Dr. Satkowiak explained that sparing occurs when parts of the skin are exposed to a lower temperature. This can occur if someone stands in a tub of freshly placed hot water, because the tub itself has not yet elevated to the same temperature as the water.

Dr. Satkowiak stated that F's injuries were indicative of "non-accident trauma or inflicted injury." Specifically, the clear demarcation lines and lack of splashing indicated that F. did not fight back or try to jump out of the water. The injuries were inconsistent with F. accidentally dipping his feet in scalding water, standing in a sink of water, or sitting in a sink basin with water running into the sink. Dr. Satkowiak stated it would be unusual for burns like this to result from someone accidentally putting their feet in hot

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[2] To protect the identity of the minor children, we refer to their mother only by her first name. For the same reason, we refer to the minors only by their first initials. No disrespect is intended.

water because most people would immediately step out of the water. Such conduct would likely result in splash burns, which F. did not have. Instead, the injuries were likely caused by an adult dunking F. in very hot water. Dr. Satkowiak explained:

> "This injury is really a classic injury we see. It is one of the reasons, when he came in, I immediately felt we needed to get the police involved. It's an injury that we see where a child is dunked into hot water, their feet are held there sustaining that burn.
>
> "You would need to have their—the foot in the water for an amount of time, depending on how hot the water is, to cause . . . a burn like this."

Dr. Satkowiak opined that a child the size of M., who was 34 months old, weighed 31.8 pounds, and was 37 inches tall, could not have caused the injuries to F., who weighed 30 pounds. Dr. Satkowiak acknowledged that F. had no injuries to indicate he was held down or resisted.

Later that day, F. was transferred to the burn center at Community Regional Medical Center, where he was seen by Dr. William Dominic. F. had deep second-degree burns on both feet extending up to the ankle that were almost mirror images of each other. The burns were consistent with a scalding injury. The tops and bottoms of both feet were equally burned and there was a sharp line of demarcation on each leg. Dr. Dominic explained that the demarcation lines indicated F. was immobile at the time he was burned. Otherwise, Dr. Dominic would expect splash marks or an uneven burn. Based on these factors, Dr. Dominic opined that the injuries were "most likely" caused by F.'s lower extremities being immobilized by someone holding them. He stated the "most likely scenario" was that an adult held F. and dunked him in a scalding hot substance. Dr. Dominic acknowledged that F. had no other injuries but stated it was nonetheless possible he was restrained without suffering any bruises. He opined that it was "highly, highly unlikely" that M. could have caused the injuries. He also believed it was "highly unlikely" that F.'s injuries were accidental.

If F. had been standing in a level of water, Dr. Dominic would expect to find sparing on the bottoms of the feet, where they had touched the bottom of the sink. However, Dr. Dominic saw no sparing on F.'s feet. If F. had been sitting in the sink basin with water running out of the faucet and down the drain, Dr. Dominic would expect to see a ring mark or line of burn along F.'s leg or buttocks, and those portions of the body that were against the sink might not have burned.

Dr. Dominic stated that a burn could occur within 5 to 20 seconds of exposure to water at 145 degrees. At 140 degrees, the time might be slightly longer, but still within seconds. At 150 degrees, a burn would occur in under five seconds. At 155 degrees, a burn would occur within a second or so.

B. The Investigation

Detective Joshua Alexander interviewed appellant on the morning on July 29, 2014, at the Fresno Police Department. Appellant stated that he heard knocking and came out of his room. He saw a mess in the living room. The kids had stacked a child's table and chairs to get up to the kitchen counter. M. got off the table and her shirt was wet. F. was sitting in the sink. Water was running and F. was playing with the water. He was not crying. The other side of the sink had dishes in it. The kids had clothes on when they went to sleep but, by this point F. was wearing only a shirt and a diaper. F. takes his clothes off in the middle of the night.

Appellant pulled F. from the sink. Appellant tried to put F. down but F. complained. Appellant took F. to Irene in the bedroom and went to start cleaning up. F. was not screaming and appellant did not know there was a problem until Irene called him back to the room. They called for a ride to the hospital right away. At some point, their neighbor, Shawn, came by. Irene's uncle took them to the hospital. They stopped on the way to get milk for M. F. was crying on and off at that point. Appellant stated either F. or M. had to have caused the injuries.

An emergency response social worker for Fresno County Department of Children and Family Services interviewed appellant on July 30, 2014, at the Fresno County Jail. Appellant stated that he awoke in the night to use the restroom and inadvertently closed the bedroom door when he returned to bed. Irene usually kept the door open to hear the kids. Appellant later woke up again and thought he heard knocking. He got up and found items from the kitchen cupboards scattered around the kitchen and living room. M. came running out of the kitchen screaming with her hands over her ears. She looked like she thought she was going to get in trouble. F. was squatting in the kitchen sink playing. Appellant thought the water was dribbling out of the sink. He touched the water but did not remember it being warm. He took F. to Irene in the bedroom. Irene started screaming, asking what happened to F.'s feet. Irene and appellant eventually took F. to the hospital.

Detective Alexander also interviewed Irene. Irene stated that appellant has a short temper and calls her a "lazy bitch," particularly when she sleeps all day, as she did on the day of the incident. Appellant also gets mad when the children make a mess. The week before this incident, appellant had gotten physical with her and she called 911. When the police came, she denied that anything had happened because she did not want appellant to get in trouble. The 911 call was admitted into evidence and played for the jury.

Law enforcement officials, including Detective Alexander, visited the apartment. The apartment was filthy and had a disturbing stench. The carpet was stained and bird feces were on the carpet. Fly strips filled with flies hung from the ceiling. There were cockroaches and flies throughout the residence. Numerous cockroaches around the sink appeared to be eating skin tissue. One side of the sink contained a stack of dishes and a pair of pajama bottoms. The pajamas were wet and it appeared they would fit F. Two large pieces of skin were found on the bottom of the sink under the dishes. Smaller pieces of skin were on the other side of the sink. The skin appeared to have come from a

person's feet. Detective Alexander found a water-soaked diaper in the restroom trash can.

A child's table and chair were located near the regular kitchen table. Officers moved the child's table and chair next to the sink to determine their height relationship to the sink. The counter in the kitchen was 37 and three-eighth inches tall. The child's table was 17 and one-half inches tall and the seat of the chair was 10 and one-fourth inches tall.

The water heater was in the northwest corner of the kitchen and its thermostat was set to the maximum, hot position. Two water temperature tests were performed. In the first test, the water tested at 10 seconds was 60 degrees. After 40 seconds, it was 100 degrees. After 90 seconds, it was 145 degrees, which was the peak temperature. The temperature of water from the bathtub faucet ranged from 125 degrees after 10 seconds to 155 degrees after 60 seconds. In the second test, the water from the kitchen sink was 65 degrees after 10 seconds. At 20 seconds, it was 100 degrees. At 40 seconds, it was 125 degrees. At 60 seconds, it was 140 degrees. The bathroom sink temperature peaked at 155 degrees, as did the bathtub faucet.

Detective Alexander attempted to speak with appellant's neighbor, Shawn. Shawn began to speak with Alexander but then his cell phone rang and he walked away. Shawn received a call from appellant, who was in jail. Appellant asked Shawn if a crime scene unit was at the apartment, and Shawn responded that he was speaking with an investigator. Appellant informed Shawn, "I told them that you knocked on the door and all that …." He also stated, "I told them I heard knocking I left the door open and I went to get the baby and so I notice that baby was, well he was burning and that's when you walked in." After the call, Shawn was less cooperative with Detective Alexander.

A specialized interviewer attempted to interview M., but she did not respond to questions.

C. The Defense Case

The defense pointed to weaknesses in the circumstantial evidence to argue that F.'s injuries may have been accidental. The defense also pointed to inconsistencies in statements made by Irene to argue that she may have inflicted the injuries herself.

Irene testified that she put M. and F. to bed in their bedroom and went into her own bedroom to watch a movie with appellant. Both kids were wearing pajamas and F. also was wearing a diaper. Irene fell asleep before appellant.

Irene was later awakened by appellant shaking her and stating that M. and F. made a mess in the kitchen. Appellant walked out of the room. He returned a minute or two later holding F. F. was not making any noise. His feet were "bloodshot red." He had no skin on his feet. Irene jumped out of bed and started "freaking out" on appellant. Appellant said he had "no clue" what happened. Irene called her sister and uncle for a ride to the hospital. About five minutes later, Shawn came over and put aloe vera on F.'s feet.

While waiting for a ride, Irene cleaned up the kitchen. The child's table was pushed against the sink with the child's chair on top. There was typewriter ink everywhere and food from the refrigerator was out. She did not clean up the sink area. In one side of the sink was a stack of dishes with F.'s diaper on top. In the other side of the sink, Irene saw F.'s skin and she placed a dish on top because she knew the police would be called. She did not call 911 because she had been told by 911 operators that they would not respond to her house due to a history of false calls.

M. and F. had a history of making messes in the kitchen, but not late at night. They climbed on things, but not in the kitchen. Neither F. nor M. had ever played with the sink before. They know how to turn on the bathtub but do not "mess with" the sink.

After about 45 minutes, Irene's uncle came and took them to the hospital. They stopped on the way to purchase milk for M.

Prior to trial, Irene gave several statements regarding the incident, some of which were inconsistent with her trial testimony. For example, Irene told the first responding officer that she and appellant both heard screaming and went to the kitchen to find both children on the kitchen counter, with F.'s feet in a sink of hot water. She also initially stated that they proceeded directly to the hospital, then stated in another interview that they stopped for gas. In one interview, she stated that her kids never wear pajamas, and that they had played in the sink before. At various times, she stated that appellant had blocked her phone from calling 911 or that appellant had told her not to call 911. At one point, Irene stated that she and appellant had been married two years. At another point, she stated that they had been married for four or five months. In yet another interview, she could not recall whether they had married in June or July of 2014.

DISCUSSION

I. Sufficiency of the Evidence

Appellant argues there is insufficient evidence to support his convictions because the expert testimony suggesting that F.'s injuries were not accidental was too insubstantial to prove guilt beyond a reasonable doubt.

A. Standard of Review

As relevant here, a person is guilty of child abuse under section 273a, subdivision (a) when the person "having the care or custody of any child, willfully causes or permits the person or health of that child to be injured." (§ 273a, subd. (a).) Section 273d, subdivision (a), applies to anyone who "willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition." (§ 273d, subd. (a).) The sentencing enhancement for infliction of great bodily injury requires proof that the defendant personally inflicted great bodily injury on a child under the age of five years. (§ 12022.7, subd. (d).)

"It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt." (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) When

reviewing a challenge to the sufficiency of the evidence, "we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) " 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on " 'isolated bits of evidence.' " ' " (*People v. Medina* (2009), 46 Cal.4th 913, 919.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*Ibid.*) "The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*Cravens*, at p. 508.)

The standard of review is the same in cases in which a conviction is based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625 (*Clark*).) "In a case built solely on circumstantial evidence, none of the individual pieces of evidence 'alone' is sufficient to convict. The sufficiency of the individual components, however, is not the test on appeal." (*People v. Daya* (1994) 29 Cal.App.4th 697, 708.) Rather, we must determine "whether a reasonable trier of fact, considering the circumstantial evidence cumulatively, could have found the defendant guilty . . . beyond a reasonable doubt." (*Id.* at p. 709.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence.' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *Clark*, at p. 625.)

B. Analysis

Appellant contends that expert testimony regarding the cause of F.'s burns is too insubstantial to support a determination of guilt beyond a reasonable doubt. He points out that Dr. Satkowiak did not know what water temperature F. was exposed to and could not opine on the reaction time of a child. He points to Dr. Dominic's testimony that burns could occur within seconds at the sink's peak water temperature of 140 or 145

degrees, and the lack of injuries on either F. or appellant, to undermine the doctors' theory that F. was restrained. We conclude the evidence was sufficient to support the judgment.

Drs. Satkowiak and Dominic both opined that F.'s injuries were consistent with nonaccidental injuries caused by an adult immobilizing F.'s feet in hot water. They reached this conclusion based on the nature of F.'s injuries, specifically the sharp demarcation lines, even burns, lack of splash marks, and lack of sparing. Although they were unable to state their conclusions with absolute certainty, Dr. Satkowiak described this as a "classic injury" that occurs "where a child is dunked into hot water, their feet are held there sustaining that burn." Dr. Dominic acknowledged the "highly unlikely" possibility of accidental injury but stated the "most likely scenario" was an adult holding and dunking F. in a scalding hot substance. Dr. Dominic also explained that it is possible to immobilize a child without that child suffering any bruises. Additionally, Drs. Satkowiak and Dominic testified that the conduct described by appellant and Irene—that F. was either standing in a sink of hot water or sitting in the sink with water running down the drain—was not consistent with the injuries sustained.

Furthermore, the jury heard testimony that appellant had a history of becoming angry over Irene's laziness and the children making messes. Appellant awoke in the night to find the children had made a mess, he advised Irene of the mess, and he returned shortly thereafter with F. whose feet were severely burned. Cumulatively, the testimony is sufficient for the jury to have drawn a logical inference that F.'s injuries were not accidental, but instead were caused by appellant, the only adult purported to be with F. at the time the injuries occurred.

The primary case relied on by appellant, *People v. Bassett* (1968) 69 Cal.2d 122, is distinguishable. There, a jury found the defendant guilty on two counts of first degree murder, impliedly finding that the defendant had sufficient mental capacity to premeditate the murders. (*Id.* at p. 124.) This finding rested on the testimony of three

expert psychiatrists presented by the prosecution. (*Id.* at pp. 136–137.) The Supreme Court reversed, finding the prosecution had not sustained its burden of proof. Two of the prosecution's psychiatrists rendered their opinions without having examined the defendant. (*Id.* at pp. 144–146.) Their testimony was held insubstantial because they adduced no reasoning in support of their conclusions and did not attempt to refute the extensive defense evidence to the contrary. (*Ibid.*) The opinion of the third psychiatrist, who had personally examined the defendant, was held insubstantial because it revealed that he labored under a misunderstanding of the term "premeditation." (*Id.* at pp. 146–149.)

Unlike in *Bassett*, a solid foundation was established for the testimony offered in this case. The doctors examined F. and based their opinions on that examination. The reasoning behind their conclusions was explained to the jury. Both doctors addressed and refuted the suggestion of an accidental cause for F.'s injuries. There is nothing to indicate either doctor labored under any legal or factual misunderstanding. In other words, the type of evidence missing in *Bassett* was presented in this case.

We hold there is sufficient evidence to support appellant's convictions.

II. Prior Domestic Violence Incident

Appellant argues that the court erred in admitting Irene's 911 call under Evidence Code section 1109, failed to weigh the prejudicial effect of this evidence under Evidence Code section 352, and admitted this unduly prejudicial evidence in violation of appellant's Fourteenth Amendment right to due process.

A. Additional Factual Background

Four days before the incident involving F., Irene made a 911 call to report "domestic violence." She told the dispatcher her husband hit and choked her. In the background, a male voice stated, "Get out of my fuckin house!" The dispatcher asked Irene for her address, but the call was disconnected.

Appellant sought to exclude, and the prosecution sought to admit, evidence of the call. The prosecution argued that the call was admissible as propensity evidence under Evidence Code section 1109. Appellant argued the call did not fall within the scope of section 1109 and was unduly prejudicial under Evidence Code section 352. The court deferred ruling on the motions pending further research.

When the court next addressed the issue, Appellant argued that the call lacked significant probative value and would mislead the jury. The prosecution argued the call was relevant to show appellant's propensity to commit acts of violence against his cohabitants. The court again deferred ruling on the motions.

The court returned to the issue immediately following voir dire. The court concluded the 911 call and related testimony were admissible under Evidence Code section 1109 based on the reasoning in *People v. Dallas* (2008) 165 Cal.App.4th 940 (*Dallas*). The court then analyzed the evidence under Evidence Code section 352. The court expressly found the probative value of the evidence was substantial, particularly considering the timing of the call. The court additionally found that presentation of the evidence was unlikely to consume an undue amount of time because the call was short and the evidence would be presented through a witness already anticipated to testify. Lastly, the court found the evidence would not be cumulative and that any prejudice to the defendant would not outweigh the probative value of the evidence. Accordingly, the court determined that the evidence could be admitted.

B. Evidence Code Section 1109

Evidence of a person's character or propensity to engage in a type of conduct is generally inadmissible to prove that person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) Evidence Code section 1109 provides two exceptions to this general rule. (Evid. Code, § 1109, subd. (a)(1), (3).) Under subdivision (a)(1), other acts of domestic violence may be admissible in a prosecution for an offense involving domestic violence. (*Id.*, § 1109,

subd. (a)(1).) Under subdivision (a)(3), certain acts of child abuse may be admissible in a prosecution for an offense involving child abuse. (*Id.*, § 1109, subd. (a)(3); *Dallas, supra,* 165 Cal.App.4th at p. 952.) In the instant case, the prosecution sought to admit acts of domestic violence in a prosecution for an offense involving child abuse. This circumstance is not expressly addressed in Evidence Code section 1109. (Evid. Code, § 1109, subd. (a); *Dallas,* at p. 952.)

This issue was, however, addressed at length by the Fourth District Court of Appeal in *Dallas, supra,* 165 Cal.App.4th at pp. 952–958. There, as in the instant case, the defendant was charged with felony infliction of injury on a child (§ 273d, subd. (a)) and felony child abuse (§ 273a, subd. (a)) based on injuries sustained by his girlfriend's baby, who lived with him. (*Dallas,* at pp. 942–943, 952.) Evidence of the defendant's prior acts of domestic violence against an ex-girlfriend were admitted at trial. (*Id.* at pp. 947–948.) The defendant argued these acts were erroneously admitted because "he was charged only with child abuse, not domestic violence, and therefore evidence of acts of domestic violence was not admissible under Evidence Code section 1109." (*Id.* at p. 952.)

The appellate court rejected the defendant's argument following a detailed statutory analysis of the term "domestic violence," as it is used in Evidence Code section 1109. As the court explained, "Evidence Code section 1109 provides: ' "Domestic violence" has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.' (Evid. Code, § 1109, subd. (d)(3).)" (*Dallas, supra,* 165 Cal.App.4th at p. 952.) The court acknowledged that child abuse does not fit

within the definition of domestic violence as set forth in section 13700.[3] (*Dallas*, at pp. 952–953.) However, the court noted that Family Code section 6211 "defines domestic violence more broadly as including abuse committed against . . . '[a] cohabitant or former cohabitant, as defined in Section 6209' (Fam. Code, § 6211, subd. (b))." (*Dallas,* at p. 953.) Further, under Family Code section 6209, " '[c]ohabitant' means a person who regularly resides in the household." (Fam. Code, § 6209; *Dallas*, at p. 953.) Considering this definition, the court held that the term "domestic violence" can include a prosecution for child abuse, where the child regularly resides in the household. (*Dallas*, at p. 953.)

We find the detailed statutory analysis set out in *Dallas* highly persuasive. Appellant cites no cases to the contrary. He nonetheless contends that *Dallas* was wrongly decided because Evidence Code section 1109, subdivision (a)(1) and (3), expressly differentiate between domestic violence and child abuse, and it is therefore incorrect to include abuse against a child within the definition of domestic violence. This argument ignores the broad definition of "cohabitant" contained in Family Code section 6209, which is expressly incorporated in Family Code section 6211, which itself is expressly incorporated in Evidence Code section 1109. This plain statutory language proscribes our interpretation of Evidence Code section 1109 (Code Civ. Proc., § 1858; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165–166), and requires us to conclude that "domestic violence" includes acts of abuse committed against a child living in the same household. "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.)

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3 Under section 13700, " '[d]omestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, 'cohabitant' means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship." (§ 13700, subd. (b).)

Furthermore, even assuming the structure of Evidence Code section 1109 can be read to create an ambiguity in the meaning of "domestic violence," the legislative history of Evidence Code section 1109 does not convince us of appellant's position. This history also was addressed in *Dallas*.[4] There, the court noted that Evidence Code section 1109 originally defined "domestic violence" with reference only to Penal Code section 13700. (*Dallas, supra,* 165 Cal.App.4th at p. 954, citing Evid. Code, former § 1109, subd. (d); Stats. 1996, ch. 261, § 2, pp. 1795, 1796.) In 2004, the definition of domestic violence under Evidence Code section 1109 was expanded to include, in certain circumstances, the definition set forth in Family Code section 6211. (*Dallas,* at pp. 954–956; former Evid. Code, § 1109, subd. (d); Stats. 2004, ch. 116, § 1, p. 406.) The Legislature understood this amendment to have two effects: to make propensity evidence admissible in child abuse cases, and to make evidence of prior violence against children admissible in any domestic violence case. (*Dallas*, at pp. 954–956, citing Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 141 (2003–2004 Reg. Sess.) as amended June 9, 2004, p. 2; and Concurrence in Sen. Amends., Assem. Bill No. 141 (2003–2004 Reg. Sess.) as amended June 9, 2004, p. 4.)

Eventually, subdivision (a)(3) was added to Evidence Code section 1109, allowing for admission of evidence of other child abuse in child abuse cases. (*Dallas, supra,* 165 Cal.App.4th at p. 956; Evid. Code, § 1109, subd. (a)(3); Stats. 2005, ch. 464, § 1, p. 2917.) The bill originally proposed to expressly make acts of domestic violence admissible in a prosecution for child abuse. (*Dallas,* at p. 956, citing Assem. Bill

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4 In *Dallas,* the defendant argued that the Family Code section 6211 definition of "domestic violence" applied to the type of evidence made admissible under Evidence Code section 1109, but not to the type of prosecution in which the evidence is made admissible. (*Dallas, supra,* 165 Cal.App.4th at p. 953.) That is, evidence of "other domestic violence" could include child abuse under the definition set out in Family Code section 6211. However, such evidence could be admissible only in a prosecution for "an offense involving domestic violence," as that term is defined in the Penal Code. (*Dallas,* at p. 953.) The *Dallas* court rejected this argument based on the statutory language and legislative history. (*Id.* at p. 954.)

No. 114 (2005–2006 Reg. Sess.) as introduced Jan. 12, 2005.) However, this express provision was eliminated prior to the bill's passage. (*Dallas,* at p. 956, citing Sen. Amend. to Assem. Bill No. 114 (2005–2006 Reg. Sess.) June 27, 2005.)

Dallas concluded that it was "by no means clear" that the Legislature's elimination of this express provision revealed an intent to preclude admission of domestic violence evidence in child abuse cases. (*Dallas, supra,* 165 Cal.App.4th at p. 956.) As *Dallas* points out, an early analysis of the bill questioned whether this provision was necessary, given that " 'children are specified victims of domestic violence under the Family Code.' " (*Ibid.*, citing Assem. Com. on Public Safety, Analysis of Assem. Bill No. 114 (2005–2006 Reg. Sess.) as amended March 8, 2005, pp. 5–6.) "Thus, the Legislature may have eliminated the cross-admissibility provision precisely because it agreed with [the *Dallas* court's] conclusion—that a prosecution for abuse of a child living in the defendant's household is 'a criminal action in which the defendant is accused of an offense involving domestic violence' within the meaning of Evidence Code section 1109, subdivision (a)(1). (Cf. *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1184 . . . ['the failure of the Legislature to adopt [the] proposed amendments . . . could merely reflect a determination that such amendments were unnecessary because the law already so provided'].)" (*Dallas,* at pp. 956–957.)

We agree with *Dallas* that the Legislature's elimination of this express provision does not aid in our analysis. (See *Dallas, supra,* 165 Cal.App.4th at pp. 956–957.) "[W]hen the Legislature amends a bill to add a provision, and then deletes that provision in a subsequent version of the bill, this failure to enact the provision is of little assistance in determining the intent of the Legislature." (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1261–1262.) This is particularly true here. As *Dallas* points out, there is discussion in the legislative analysis questioning whether this provision was necessary. (*Dallas,* at p. 956, citing Assem. Com. on Public Safety, Analysis of Assem. Bill No. 114 (2005–2006 Reg. Sess.) as amended March 8, 2005,

pp. 5–6.) We have no basis to conclude whether the Legislature omitted the express provision based on this or other concerns. We certainly find no clear statement of legislative intent to contradict the statutory language that includes abuse against a child in the household within the meaning of domestic violence.

Finally, appellant argues that the domestic violence evidence in this case was irrelevant because domestic violence against a spouse is not probative of a propensity to commit child abuse. Evidence Code section 1109 "does not purport to make irrelevant evidence relevant." (*People v. Earle* (2009) 172 Cal.App.4th 372, 400 [discussing Evid. Code, § 1108].)[5] Thus, evidence offered under this section "must have some tendency in reason to show that the defendant is predisposed to engage in conduct *of the type charged*." (*Earle,* at p. 397.) The probative value of an uncharged act often turns on its similarity to the charged offense. (*Ibid.*; *People v. Johnson* (2010) 185 Cal.App.4th 520, 531–532.)

Here, we acknowledge that the incidents with Irene and F. differ in their specifics. One was committed against a spouse, the other against a child. One involved hitting and choking, the other involved holding the child's feet in scalding water. However, the incidents occurred within days of each other and both acts occurred against a member of appellant's household. Appellant had a history of anger toward Irene for her perceived oversleeping and laziness, and he very recently expressed his anger by hitting and choking her. He also had a history of becoming angry when the children made a mess. On the date of the charged offense, appellant awoke in the night to find the children making a mess and Irene remained in bed. It is reasonable to infer that appellant was angry with these circumstances and expressed that anger through violence toward F. (See

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5 Evidence Code sections 1108 and 1109 are "virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence." (*People v. Johnson* (2000) 77 Cal.App.4th 410, 417 (*Johnson*).) The two provisions form "complementary portions of the same statutory scheme." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 (*Brown*).)

Johnson, supra, 77 Cal.App.4th at p. 419 [the typically repetitive, escalating nature of domestic violence is one of the reasons propensity evidence is relevant in domestic violence prosecutions]; see also *Brown, supra,* 77 Cal.App.4th at p. 1333 [same].) We therefore conclude that the evidence was relevant.

In sum, we hold that the prior act of domestic violence against Irene was admissible under Evidence Code section 1109, subject to consideration under Evidence Code section 352.

C. Evidence Code Section 352

Evidence Code section 1109 permits the admission of prior acts of domestic violence only if "the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1), (3)). Under Evidence Code section 352, evidence is inadmissible if the court determines "its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (*Id.*, § 352.)" (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–29.) Undue prejudice arises if the evidence " 'poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" ' " (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) "The potential for such prejudice is 'decreased' when testimony describing the defendant's uncharged acts is 'no stronger and no more inflammatory than the testimony concerning the charged offenses.' " (*Ibid.*) A trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion. (*Clark, supra,* 63 Cal.4th at p. 586.)

Here, appellant contends the court "conducted no Evidence Code 352 analysis" and thus did not exercise its discretion. Appellant is incorrect. As stated above, the court conducted this analysis on the record immediately following voir dire. The court found the probative value of the prior act evidence to be substantial, given that it occurred mere days before the charged incident. The court also found the evidence was unlikely to consume an undue amount of time, was not cumulative, and was not overly prejudicial.

We find no abuse of discretion in the trial court admitting evidence of the 911 call under Evidence Code section 352. The call was probative of appellant's propensity to commit acts of violence against members of his household out of anger. Presentation of the evidence consumed little time and had little risk of misleading the jury. Although the evidence was damaging to appellant, it was not overly prejudicial. The incident precipitating the 911 call was not described in any detail, nor was it particularly inflammatory. Indeed, it was far less inflammatory that the testimony concerning the charged offense. Accordingly, we reject any claim that the evidence should have been excluded under Evidence Code section 352.

D. Due Process

Appellant contends that the admission of the 911 call evidence, without the safeguard of analysis under Evidence Code section 352, violated his constitutional right to due process. Again, this argument is based on the incorrect premise that the court did not evaluate the evidence under Evidence Code section 352. Because the court considered the evidence under Evidence Code section 352 and did not abuse its discretion in determining the evidence was admissible, appellant's due process argument necessarily fails.

The California Supreme Court has upheld the constitutionality of the admission of certain propensity evidence, provided that the evidence is subject to an Evidence Code section 352 analysis. (*People v. Falsetta* (1999) 21 Cal.4th 903.) In *Falsetta*, the defendant argued that Evidence Code section 1108, which permits admission of other sexual offenses in a prosecution for a sexual offense, violates due process. (*Falsetta,* at p. 910.) Assuming, without deciding, that the bar against propensity evidence implicates due process, the court found there was no "undue unfairness" to the limited exception contained in Evidence Code section 1108. (*Falsetta,* at p. 915.) The court pointed out that Evidence Code section 1108 affords defendants "substantial protections," including

the protections of Evidence Code section 352, which "provides a safeguard that strongly supports the constitutionality of section 1108." (*Falsetta,* at pp. 915–916.)

The reasoning of *Falsetta* has been extended to evidence made admissible under Evidence Code section 1109. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, fn.14; *Johnson, supra,* 77 Cal.App.4th at p. 419; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.) Here, the court expressly evaluated the evidence under Evidence Code section 352 and concluded it was admissible. We therefore hold that appellant was afforded the safeguards required to satisfy due process.

III. CALCRIM No. 852

The court modified CALCRIM No. 852 to state that, if the jury determined that appellant committed the uncharged act as reported in the 911 call, the jury could conclude that appellant was likely to commit the crimes of child abuse and corporal injury to a child. Appellant argues the instruction was erroneous because this inference is impermissible.

A. Additional Factual Background

The prosecution requested that the court instruct the jury with CALCRIM No. 852, regarding evidence of uncharged domestic violence. The court questioned whether the instruction should be given because the definition of domestic violence contained in the instruction did not include violence against a stepchild. The prosecution argued that the instruction should be given under *Dallas.* Appellant argued that *Dallas* was wrongly decided. The court ultimately concluded *Dallas* was persuasive and charged the jury as follows:

> "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically that defendant physically assaulted Irene [S.] as reported in a 911 call to the Fresno Police Department on July 25th, 2014.
>
> "Domestic violence means abuse committed against an adult who is a spouse or cohabitant of the defendant—excuse me.

"I'm going to reread that definition because, as it was presented a moment ago, it was an error.

"Domestic violence means abuse committed against . . . a person who is a spouse or cohabitant of the defendant.

"Abuse means intentionally recklessly causing or attempting to cause bodily injury or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

"The term cohabitants means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabitating include, but are not limited to, one, sexual relations between the parties while sharing the same residence; two, sharing of income or expenses; three, joint use or ownership of property; four, the parties holding themselves out as husband and wife; five, the parties registering as domestic partners; six, the continuity of the relationship; and seven, the length of the relationship.

"You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant, in fact, committed the uncharged domestic violence.

"Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit the crime of child abuse and/or corporal injury to a child as charged here.

"If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of child abuse and/or corporal injury to a child. The People must still prove each charge and allegation beyond a reasonable doubt. Do not consider this evidence for any other purpose."

B. Standard of Review

We review a claim of instructional error de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Posey* (2004) 32 Cal.4th 193, 218.) We must ascertain the relevant law and determine whether the given instruction correctly stated it. (*People v. Kelly* (1992) 1 Cal.4th 495, 525–526.) "[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) Jurors are presumed to have understood and followed the trial court's jury instructions. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

An instruction permitting the jury to credit or reject an inference "based on its evaluation of the evidence . . . does not relieve the People of any burden of establishing guilt beyond a reasonable doubt." (*People v. Anderson* (1989) 210 Cal.App.3d 414, 427–430.) However, "[t]he due process clauses of the federal Constitution . . . require a relationship between the permissively inferred fact and the proven fact on which it depends." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180, superseded by statute on another ground as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 63, fn.8.) "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin* (1985) 471 U.S. 307, 314–315 (*Francis*).)

C. Analysis

CALCRIM No. 852 is intended to instruct the jury on the proper role of propensity evidence admitted under Evidence Code section 1109. (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251–252.) Appellant complains that CALCRIM No. 852, as modified in this case, improperly permitted the jury to conclude, from evidence of domestic violence against Irene, that he had a propensity to commit child abuse of and/or corporal injury to F. As explained above, this inference is authorized under Evidence Code section 1109. The inference is supported by reason and common sense. (See *Francis*,

supra, 471 U.S. at pp. 314–315.) A reasonable juror could conclude that appellant was angry when he discovered the children making a mess in the middle of the night, and that appellant's recent anger toward and abuse of Irene escalated to anger toward and abuse of F. We find no error.

IV. Prior Serious Felony Enhancement

The trial court enhanced appellant's sentence by five years pursuant to section 667, subdivision (a). At the time of sentencing, the court lacked discretion to do otherwise. As the applicable statutes then read, the court was required to impose a five-year consecutive term upon "any person convicted of a serious felony who previously ha[d] been convicted of a serious felony" (former § 667, subd. (a)(1)), and it had no authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667" (former § 1385, subd. (b)).

Senate Bill No. 1393 has removed these restrictions, effective January 1, 2019. (Stats. 2018, ch. 1013, §§ 1, 2.) As appellant's case is not yet final, the People concede the amendments to sections 667, subdivision (a) and 1385, subdivision (b) apply, and remand is required.

DISPOSITION

The matter is remanded for trial court to consider striking appellant's prior serious felony enhancement. (§ 667, subd. (a).) The judgment is otherwise affirmed.

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HILL, P.J.

WE CONCUR:

_____
DETJEN, J.

_____
FRANSON, J.